Appendix A
Rule Changes

Parts 21, 73, 74 and 76 of Title 47 of the Code of Federal Regulations are amended to read as follows:

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. Section 21.912 is amended by revising the title to add at the end of the title "and MDS/cable cross-ownership" and by revising Note 1 as follows:

§ 21.912 Cable television company eligibility requirements and MDS/cable cross-ownership.

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Note 1: In applying the provisions of this section, ownership and other interests in MDS licensees or cable television systems will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate MDS licensee or cable television system will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate MDS licensee or cable television system in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate MDS licensee or cable television system, or if any of the officers or directors of the MDS licensee or cable television system are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interests in an MDS licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant MDS licensee or cable television system are subject to said trust.

(f) Subject to paragraph (j) of this Note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (j) of this Note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership and the licensee or system so certifies.

(2) In order for a licensee or system that is a limited partnership to make the certification set forth in paragraph (g)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the partnership. In order for a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (g)(2) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the MDS or cable television activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the MDS or cable television businesses of the partnership or LLC or RLLP.

(h) Officers and directors of an MDS licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of MDS or cable television service, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of an MDS licensee or cable television system, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the MDS licensee or cable television system subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the Licensee Qualification Report.] The officers and directors of a sister corporation of an MDS licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

(i) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (i)(1) of this section plus the sum of the interests computed under paragraph (i)(2) of this section is equal to or exceeds 20 percent.

(j) Notwithstanding paragraphs (b), (f), and (g) of this Note, the holder of an equity or debt interest or interests in an MDS licensee or cable television system subject to the MDS/cable cross-ownership rule ("interest holder") shall have that interest attributed if:

(1) the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (all equity plus all debt) of that MDS licensee or cable television system; and

(2) the interest holder also holds an interest in an MDS licensee or cable television system that is attributable under paragraphs of this Note other than this paragraph (j) and which operates in any portion of the franchise area served by that cable operator's cable system.

(k) The term "area served by a cable system" means any area actually passed by the cable operator's cable system and which can be connected for a standard connection fee.

(l) As used in this section "cable operator" shall have the same definition as in § 76.5.

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PART 73 - BROADCAST RADIO SERVICES

1. Section 73.3555 is amended by removing paragraphs (a)(3) and (a)(4)(iii), renumbering paragraph (a)(4) to read as paragraph (a)(3), revising the first sentence of Note 2(b) to add at the beginning of the sentence "Subject to paragraph (j) of this Note," by revising Notes 2(c), 2(f), 2(g), and 2(i) as follows, and by adding Notes 2(j) and 2(k):

§ 73.3555 Multiple Ownership.

* * * * *

Note 2 * **

(b) * * *

(c) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. * * *

* * * * *

(f) Subject to paragraph (j) of this Note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (j) of this Note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(2) In order for a licensee or system that is a limited partnership to make the certification set forth in paragraph (g)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. In order for a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (g)(1) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

* * * * *

(i) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (i)(1) of this section plus the sum of the interests computed under paragraph (i)(2) of this section is equal to or exceeds 20 percent.

(j) Notwithstanding paragraphs (b), (f), and (g) of this Note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

(1) the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

(2) (i) the interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this Note other than this paragraph (j); or

(ii) the interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held.

For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple or cross-ownership rule that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the television duopoly rule contained in paragraph (b) of this section.

(k) "Time brokerage" is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

(1) Where the principal community contours (predicted or measured 5 mV/m groundwave contour for AM stations computed in accordance with § 73.183 or § 73.186 and predicted 3.16 mV/m contour for FM stations computed in accordance with § 73.313) of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(2) Where two television stations are both licensed to the same market, as defined in the television duopoly rule contained in paragraph (b) of this section, and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(3) Every time brokerage agreement of the type described in this Note shall be undertaken only

pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b) through (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) if the brokering station is a radio station.

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2. Section 73.3526 is amended by revising paragraph (e)(14) to read as follows, and by adding (e)(16) as follows:

§ 73.3526 Local public inspection file of commercial stations.

* * * * *

(e) * * *

(14) For commercial radio and television stations, a copy of every agreement or contract involving time brokerage of the licensee's station or of another station by the licensee, whether the agreement involves stations in the same markets or in differing markets, with confidential or proprietary information redacted where appropriate. These records shall be retained as long as the contract or agreement is in force.

(16) Radio and television joint sales agreements. For commercial radio and commercial television stations, a copy of agreement for the joint sale of advertising time involving the station, whether the agreement involves stations in the same markets or in differing markets, with confidential or proprietary information redacted where appropriate.

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3. Section 73.3613 is amended by revising paragraphs (d) and (e) to read as follows:

§ 73.3613 Filing of contracts.

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(d) Time brokerage agreements: Time brokerage agreements involving radio stations, where the licensee (including all parties under common control) is the brokering entity, there is a principal community contour overlap (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) overlap with the brokered station, and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving television stations where licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both licensed to the same market as defined in the television duopoly rule contained in Section 73.3555(b), and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving radio or television stations that would be attributable to the licensee under Section 73.3555 Note 2(j). Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC: contracts relating to the joint sale of broadcast advertising time that do not constitute time brokerage agreements pursuant to Section 73.3555 Note 2(k); subchannel leasing agreements for Subsidiary Communications Authorization operation; franchise/leasing agreements for operation of telecommunications services on the TV vertical blanking interval and in the visual signal; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

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PART 74 - EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

1. Section 74.931 is amended by adding Note 1 at the end of 74.931(i) as follows:

Note 1: In applying the provisions of paragraphs (h) and (i) of this section, an attributable ownership interest shall be defined by reference to the Notes contained in § 21.912.

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PART 76 - CABLE TELEVISION SERVICE

1. Section 76.501 is amended by adding Note 6 as follows:

§ 76.501 Cross-ownership.

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Note 6: In applying the provisions of paragraph (a) of this Section, Notes 1 through 4 shall apply, provided however that:

(a) The attribution benchmark for passive investors in paragraph (c) of Note 2 shall be 20 percent and the benchmarks in paragraph (i)(1) and (i)(3) of Note 2 shall be 20 percent;

(b) An interest holder in a Limited Liability Company or Registered Limited Liability Partnership shall be subject to the provisions of paragraph (g) of Note 2 in determining whether its interest is attributable; and

(c) Notwithstanding paragraphs (b) and (f) of Note 2, the holder of an equity or debt interest or interests in a broadcast licensee or cable television system ("interest holder") shall have that interest attributed if:

(1) the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (defined as the aggregate of all equity plus all debt) of that media outlet; and

(2) (i) the interest holder also holds an interest in another broadcast licensee or cable television system which operates in the same market and is attributable without reference to this paragraph (c); or

(ii) the interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held.

APPENDIX B

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[349] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51, & 87-154, 11 FCC Rcd 19895 (1996) ("*Attribution Further Notice*").[350] The Commission sought written public comment on the proposals in the *Attribution Further Notice*, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[351]

I. Need For, and Objectives of the Report and Order:

The attribution rules seek to identify those interests in or relationships to licensees or media entities that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions. The attribution rules are used to implement the Commission's broadcast multiple ownership rules. Our goals in this proceeding are to maximize the precision of the attribution rules, avoid disruption in the flow of capital to broadcasting, afford clarity and certainty to regulatees, ease application processing, and provide for the reporting of all the information we need in order to make our public interest finding with respect to broadcast applications. While our focus is on the issues of influence or control, at the same time, we must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry. The rules adopted meet these goals.

II. Summary of Significant Issues Raised by the Public in Response to the IRFA:

One comment, filed specifically in response to the IRFA contained in the *Second Further Notice of Proposed Rulemaking* in MM Dockets 91-221 and 87-8, FCC 96-438 (released November 7, 1996), addressed an issue relevant to all the Commission's proceedings dealing with the mass media multiple ownership rules. This comment, filed by the Media Access Project, the Center for Media Education, the Minority Media and Telecommunications Council, the United Church of Christ, Office of Communications ("MAP"), addressed the Commission's characterization of certain radio and television stations as "small entities."

Specifically MAP argues that the Commission overstated the number of small entities that will

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[349] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[350] An IRFA pursuant to Pub. L. No. 96-354, § 603, 94 Stat. 1165 (1980) was incorporated into the *Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51 & 87-154, 10 FCC Rcd 3606 (1995) ("*Attribution Notice*").

[351] *See* 5 U.S.C. § 604.

be affected by changes to the ownership rules. According to MAP, the Commission acknowledged that Commission estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies. MAP also argued that the Commission's estimates do not take into consideration licensees with 10, 20, 30 or more broadcast stations, or those licensees that have entered into LMAs. Instead, the Commission's estimates look at the revenues of each station, individually, to determine if it qualifies as a small business. MAP argued that under this approach, individual broadcast properties of Fortune 500 companies might be defined as small businesses.

Furthermore, MAP argued that changing the Commission's multiple ownership rules will harm small broadcasters in numerous ways. First, it will put small broadcasters at a competitive disadvantage with larger stations that can offer advertisers lower rates and/or greater exposure. Second, it will drive up the costs of stations, eliminating the ability of small broadcasters (especially female and minority broadcasters and potential new entrants) to purchase stations. In addition, according to MAP, small advertisers will be disadvantaged if a broadcaster owns several broadcast stations in a market, since a broadcaster could drive up advertising rates as a condition of access to those stations.

Other commenters did not specifically respond to the IRFA, but did address small business issues. TCI, Pappas, Qwest, and BET opposed the equity/debt plus rule, believing that it would preclude important sources of investments by same-market broadcasters and networks, and that it would therefore be particularly detrimental to small and minority broadcasters.

Viacom, in contrast, stated that the equity/debt plus rule would not jeopardize the availability of capital to broadcasters. It further asserted that any potential impact could be offset by increasing the passive-investor benchmark to 33 percent under its own proposal.

III. Description and Estimate of the Number of Small Entities To Which Rules Will Apply:

1. Definition of a "Small Business"

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). According to the SBA's regulations, entities engaged in television broadcasting Standard Industrial Classification ("SIC") Code 4833 -- Television Broadcasting Stations, may have a maximum of $10.5 million in annual receipts in order to qualify as a small business concern.[352] Similarly, entities engaged in radio broadcasting, SIC Code 4832 -- Radio Broadcasting

[352] This revenue cap appears to apply to noncommercial educational television stations, as well as to commercial television stations. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833)" as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged

Stations, have a maximum of $5 million in annual receipts to qualify as a small business concern. 13 C.F.R. §§ 121.101 *et.seq*. This standard also applies in determining whether an entity is a small business for purposes of the RFA.

Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." While we tentatively believe that the foregoing definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the new rules on small television and radio stations, we did not propose an alternative definition in the IRFA. Accordingly, for purposes of this *Report and Order*, we utilize the SBA's definition in determining the number of small businesses to which the rules apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations and to consider further the issue of the number of small entities that are radio and television broadcasters in the future. Further, in this FRFA, we will identify the different classes of small radio and television stations that may be impacted by the rules adopted in this *Report and Order*.

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We were unable at this time to define or quantify the criteria that would establish whether a specific television or radio station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any television or radio station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We attempted to factor in this element by looking at revenue statistics for owners of television stations. However, as discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

in television broadcasting and which produce taped television program materials.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 C.F.R. § 121.104(d)(1). The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Instead of making an independent determination of whether radio and television stations were affiliated based on SBA's definitions, we relied on the data bases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules amended by this *Report and Order* will apply to full service television and radio licensees and permittees, potential-~~licensees~~ and permittees, cable services or systems, MDS and ITFS, and newspapers.

Radio and Television Stations

The rules adopted in this *Report and Order* will apply to full service television and radio stations. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business.[353] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[354] Included in this industry are commercial, religious, educational, and other television stations.[355] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[356] Separate establishments primarily engaged in producing

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[353] 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

[354] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

[355] *Id. See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

[356] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

taped television program materials are classified under another SIC number.[357]

There were 1,509 television stations operating in the nation in 1992.[358] That number has remained fairly constant as indicated by the approximately 1,594 operating television broadcasting stations in the nation as of June 1999.[359] For 1992[360] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[361]

The rule changes will also affect radio stations. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[362] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[363] Included in this industry are commercial, religious, educational, and other radio stations.[364] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[365] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.[366] The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992.[367] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[368] As of June 1999, official Commission records indicate that 12,560 radio stations are

357 *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

358 FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

359 FCC News Release Broadcast Totals as of June 30, 1999 (released July 19, 1999).

360 Census for communications establishments are performed every five years ending with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra,* note 356.

361 The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

362 13 C.F.R. § 121.201, SIC 4832.

363 Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

364 *Id.*

365 *Id.*

366 *Id.*

367 The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

368 FCC News Release No. 31327, Jan. 13, 1993.

currently operating.[369]

Thus, the rule changes will affect approximately 1,594 television stations, approximately 1,227 of which are considered small businesses.[370] Additionally, the rule changes will affect 12,560 radio stations, approximately 12,057 of which are small businesses.[371] These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

Cable Services or Systems

SBA has developed a definition of small entities for cable and other pay television services (SIC 4841), which includes all such companies generating $11 million or less in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services, and 1,423 had less than $11 million in revenue.

The Commission has developed its own definition of a small cable company for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[372] Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.[373] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules proposed in this *Report and Order*. The Commission's rules also define a "small system," for the purposes of cable rate regulation, as a cable system with 15,000 or fewer subscribers.[374] We do not request nor do we collect information concerning cable systems serving 15,000 or fewer subscribers and thus are unable to estimate at this time the number of small cable systems nationwide.

[369] FCC News Release, Broadcast Station Totals as of June 30, 1999 (released July 19, 1999.

[370] We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1999 total of 1,594 TV stations to arrive at 1,227 stations categorized as small businesses.

[371] We use the 96 percent figure of radio station establishments with less than $5 million revenue from the Census data and apply it to the 12,560 individual station count to arrive at 12,057 individual stations as small businesses.

[372] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995).

[373] Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

[374] 47 C.F.R. § 76.901(c).

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[375] Section 76.1403(b) of the Commissions' rules defines a small cable system operator as one which serves in the aggregate fewer than 617,000 subscribers, and whose total annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[376] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.[377] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS and ITFS

Other pay television services are also classified under Standard Industrial Classification (SIC) 4841, which includes cable systems operators, closed circuit television services, direct broadcast satellite services (DBS), multipoint distribution systems (MDS), satellite master antenna systems (SMATV), and subscription television services.

The Commission refined the definition of "small entity" for the auction of MDS as an entity that together with its affiliates has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[378] This definition of a small entity in the context of the Commission's *Report and Order* concerning MDS auctions that has been approved by the SBA.[379]

The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas ("BTAs"). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MDS is an especially competitive service, with approximately 1573 previously authorized and proposed MDS facilities as of 1996. Information available to us indicates that no MDS facility generates revenue in excess of $11 million annually. We tentatively conclude that for purposes of this IRFA, there are approximately 1634 small MDS providers as defined by the SBA and the Commission's auction rules.

Newspapers

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[375] 47 U.S.C. § 543(m)(2).

[376] 47 C.F.R. § 76.1403(b).

[377] Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

[378] 47 C.F.R. § 21.961(b)(1).

[379] *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

Some of the rule changes may also apply to daily newspapers that hold or seek to acquire an interest in a broadcast station that would be treated as attributable under the rules. A newspaper is an establishment that is primarily engaged in publishing newspapers, or in publishing and printing newspapers.[380] The SBA defines a newspaper that has 500 or fewer employees as a small business.[381] Based on data from the U.S. Census Bureau, there are a total of approximately 6,715 newspapers, and 6,578 of those meet the SBA's size definition.[382] However, we recognize that some of these newspapers may not be independently owned and operated and, therefore, would not be considered a "small business concern" under the Small Business Act.[383] We are unable to estimate at this time how many newspapers are affiliated with larger entities. Moreover, the rule changes would apply only to daily newspapers, and we are unable to estimate how many newspapers that meet the SBA's size definition are daily newspapers. Consequently, we estimate that there are fewer than 6,578 newspapers that may be affected by the rule changes in this *Report and Order*.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

The *Report and Order* imposes compliance with the amended attribution rules set forth in the *Report and Order*. Compliance will require licensees to file with the Commission amended Ownership Report Forms (FCC Form 323) to reflect interests attributable under the amended attribution rules. Compliance will also require licensees that have entered into Joint Sales Agreements (JSAs) to place such agreements in their public inspection files with confidential or proprietary information redacted where appropriate. In addition, pursuant to the new rules, certain television time brokerage agreements will be required to be filed with the Commission where they are intra-market agreements or are inter-market agreements that come under the equity/debt plus attribution standard adopted by the *Report and Order*. Finally, compliance may require some licensees whose ownership interests under the amended attribution rules violate the multiple ownership rules, to divest the prohibited interests within the time periods specified in the *Report and Order*.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The *Report and Order* retains the current 5 percent active voting stock attribution benchmark. We believe that our original decision to set a 5 percent benchmark to capture influential interests remains valid and will not unduly restrict capital availability. Further, we note that our concerns over capital availability that originally prompted the proposal to increase the active voting stock benchmark have eased somewhat, particularly in light of the increasing strength shown by the communications sector and financial markets in general over the past several years. This increase in capital spending occurred within the context of our current attribution rules, and therefore provides us with strong evidence of the continued

[380] 13 C.F.R. § 121.201 (SIC 2711).

[381] *Id.*

[382] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 3, SIC Code 2711 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[383] 15 U.S.C. § 632.

availability of capital in the communications industry. And, to the extent that there are still concerns about not impeding capital flow to broadcasting, we believe that they will be adequately addressed since the *Report and Order* increases the passive investor benchmark.

The *Report and Order* increases the voting stock benchmark from 10 percent to 20 percent for passive investors. We believe that increasing the passive investor benchmark to 20 percent will give broadcasters increased access to investment capital, while preserving the Commission's ability to effectively enforce its ownership rules. This decision takes into account the special nature of the passive investor category, in terms of the legal and fiduciary requirements that constrain passive investors' involvement in the management and operational affairs of the firms in which they invest. In addition, passive investors have become an increasingly important source of investment capital to the corporate sector. Finally, the Commission recognizes that the pace of technological change within broadcasting, particularly the transition to DTV, might require access to such new sources of investment capital.

Further, we note that the record strongly supports an increase in the passive investor benchmark and supports our belief that such an increase will help assure that the attribution changes adopted herein will reinforce the trends in broadcast investment and growth in passive investment levels noted above, particularly at a time when television broadcasters are undertaking the conversion to digital television. We believe that increasing the passive investor benchmark is a relatively safe way to increase capital flows into broadcasting, without compromising the ability of our attribution rules to capture influential interests. The *Report and Order* retains the current definition of "passive investors," which is limited to bank trust departments, insurance companies and mutual funds.

The *Report and Order* does not eliminate the single majority shareholder or nonvoting stock exemptions, but, rather, to address the concerns that we raised in the *Attribution Notice* and *Attribution Further Notice*, we will adopt our equity and/or debt plus ("EDP") attribution proposal, as a new rule that would function in addition to the other attribution rules. Under this new EDP rule, where the investor is either (1) a "major program supplier," as defined herein to include all programming entities (including networks and time brokers) that supply over 15 percent of a station's total weekly broadcast programming hours, or (2) a same-market media entity subject to the broadcast multiple ownership rules (including broadcasters, cable operators, and newspapers), its interest in a licensee will be attributed if that interest exceeds 33 percent of the total asset value (equity plus debt) of the licensee. The *Report and Order* refers to total asset value as "total assets." In the case of a major program supplier, the investment will be attributable only if the investment is in a licensee to which the requisite triggering amount of programming is provided.

The targeted approach embodied in the EDP rule reflects our current judgment as to the appropriate balance between our goal of maximizing the precision of the attribution rules by attributing all interests that are of concern, and only those interests, and our equally significant goals of not unduly disrupting capital flow and of affording ease of administrative processing and reasonable certainty to regulatees in planning their transactions. The bright-line EDP test will provide more regulatory certainty than a case-by-case approach that requires review of contract language. Thus, the EDP rule will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs.

In the *Attribution Further Notice*, we invited comment on the impact of a 33 percent EDP threshold on small business entities, particularly on whether there would be a disproportionate impact on small or minority entities. While some parties have argued that adoption of an equity/debt plus proposal would deter capital flow to broadcasting generally and, in particular, for digital television, others have argued strongly that this is not the case. We have no basis to conclude or reason to believe that the EDP rule would unduly deter investment. The equity/debt plus proposal does not preclude investment by any entity; rather, it caps nonattributable investment levels for entities that have the potential to influence licensees. The limit does not apply to all entities that might invest or help fund the transition to digital television or otherwise invest in licensees. Additionally, to help assure that our actions today do not unduly impede capital flow to broadcasting, we have raised the passive investor benchmark. As discussed above, we believe that because of the nature of passive investors, we may raise that benchmark consistent with our goal of maximizing the precision of the attribution rules. In addition, we will consider individual rule waivers in particular cases where compelling evidence is presented that the conversion to digital television would otherwise be unduly impeded or that a waiver would significantly expedite DTV implementation in that particular case.

While some commenters strongly argued that applying the EDP rule to program suppliers would curb investment in broadcast stations and possibly hurt weaker UHF stations and might deter investment that would facilitate the conversion to DTV, they do not provide empirical evidence to support this argument. We also note that the rule does not preclude investment, but merely provides that investments over a certain level will be deemed presumptively attributable. Networks are therefore free to invest in their affiliates, subject of course to the applicable multiple ownership rules. Moreover, the EDP rule does not attribute investments, even those by networks in their affiliates, which fall below the 33 percent threshold. Thus, a major program supplier may hold 32 percent of the total assets of a station to which it supplies programming in excess of the 15 percent standard. This would comply with all EDP limits and the interests would not be attributable. In addition, the EDP rule does not affect investments by entities other than major program suppliers or same-market media entities. Under these circumstances, we believe that the EDP rule will not curb investment, deter new entry, or curb the conversion to DTV.

The *Report and Order* also adopts a new rule to attribute television LMAs, or time brokerage of another television station in the same market, for more than fifteen percent of the brokered station's broadcast hours per week and to count such LMAs toward the brokering licensee's local ownership limits. We believe that the rationale for attributing LMAs set forth in the *Radio Ownership Order*, -- *i.e.*, to prevent the use of time brokerage agreements to circumvent our ownership limits -- applies equally to same-market television LMAs.

The record in this proceeding supports our decisions to attribute television LMAs and to count attributed radio LMAs toward all applicable radio ownership limits. We agree with most commenters, representing a variety of interests ranging from ABC to the public interest group MAP, that television LMAs, like radio LMAs, represent a degree of influence and control that warrants ownership attribution and that, to decide otherwise, based on the precedent of the attribution of radio LMAs, would be inconsistent.

We will require stations involved in television time brokerage agreements (inter-market as well as intra-market agreements) to keep copies of those agreements in their local public inspection files, with confidential or proprietary information redacted where appropriate, and to file, with the Commission, within 30 days of execution, a copy of any local time brokerage agreements that would result in the arrangement being counted in determining the brokering licensee's compliance with the multiple ownership rules. We note that these provisions impose an affirmative obligation on licensees to determine, in the first instance, whether a particular LMA is attributable (either under the *per se* rule or the EDP rule), and to file the agreement with the Commission if it is.

The *Report and Order* also eliminates the cross interest policy. Our goals in initiating this proceeding include maximizing the clarity of the attribution rules, providing reasonable certainty and predictability to parties to allow transactions to be planned, and easing application processing. Commenters have argued that the vagueness and uncertainty imposed by the *ad hoc* application of the cross-interest policy have chilled investment. As CalPERS argues, this uncertainty impedes the ability of broadcasters to enter into transactions because the policy can be invoked to prohibit a seemingly permissible transaction.

We note that the EDP rule directly covers concerns treated under the non-attributable interests prong of the cross-interest policy. In adopting that rule, we will reach those situations involving formerly nonattributable interests that raised the most concern with respect to issues of competition and diversity, some of which were previously addressed in administering the cross-interest policy. We recognize, however, that the EDP rule does not cover all the areas encompassed by the cross-interest policy. It would not cover key employees, for example. We nonetheless believe, as commenters have pointed out, that internal conflict of interest policies and common law fiduciary duty and contract remedies provide adequate substitutes for our administration of the policy with respect to key employees. In addition, many key employees are also officers and directors and thus already covered by the attribution rules. In any event, we believe that the very small risk of harm to competition by a key employee in an instance not covered by any of these other regulations and remedies is greatly outweighed by the benefits of minimizing our case-by-case approach to transactions and applying bright line tests, such as the EDP test and our other attribution rules.

With respect to joint ventures, we believe that application of a cross-interest policy is unwarranted. The ownership and attribution rules define the level of combined ownership that is permissible in the local market. We recognize that the cross-interest policy as applied to joint ventures is mostly, if not completely, subsumed by the application of the current multiple ownership rules. To the extent that it is not so subsumed, we believe that it should be eliminated. We agree that the burdens of case-by-case review are not justified for transactions that already comply with the multiple ownership rules. Furthermore, as other commenters noted, the application of the antitrust laws should prevent or remedy any abuses of joint venture relationships not already subject to the multiple ownership rules.

The *Report and Order* declines to attribute JSAs. Based on the record in this proceeding, we do not believe that agreements which meet our definition of JSAs convey a degree of influence or control over station programming or core operations such that they should be fully attributed. We define JSAs as contracts that affect primarily the sales of advertising time, as distinguished from LMAs, which may affect programming, personnel, physical facilities, and core operations of stations. We note that in our *DTV Fifth Report and Order*, we stated that we would look with favor upon joint business arrangements among broadcasters that would help them make the most productive and efficient uses of their channels to help facilitate the transition to digital technology. JSAs may be one such joint business arrangement. Although both DOJ and the Commission are concerned about the competitive consequences of business agreements such as JSAs, our concerns are not necessarily identical. DOJ's comments explicitly recognize that in addition to competition issues, the Commission is also concerned with issues of diversity and reducing unnecessary administrative burdens.

Accordingly, upon considering and weighing competition, diversity, and administrative concerns, we decline to impose new rules attributing JSAs as long as they are truly JSAs that deal with the sale of advertising time and do not contain terms that affect programming or other core operations of the stations such that they are, in fact, substantively equivalent to LMAs. We will retain our current policies concerning JSAs. Furthermore, in the absence of specific evidence of widespread abuse of JSAs by broadcasters, we also decline to adopt the general disclosure and reporting requirement for radio JSAs recommended by DOJ in its comments. We will, however, require broadcasters who have entered into JSAs to place such agreements in their public inspection files, pursuant to 47 C.F.R. Sections 73.3526 and 73.3613(e) of the Commission's Rules, with confidential or proprietary information redacted where appropriate. This requirement will facilitate monitoring of JSAs by the public, competitors and regulatory agencies. We do, however, retain discretion, in all events, to review cases involving radio or television JSAs on a case-by-case basis in the public interest, where it appears that such JSAs do pose competition, diversity, or administrative concerns. Finally, we emphasize that all JSAs are of course still subject to antitrust laws and independent antitrust review by the Department of Justice.

We see no reason to revise our previous decision to treat limited partnership interests as distinct from corporate voting equity interests, and therefore elect not to adopt equity benchmarks for limited partnership interests. As we stated in the *Attribution Further Reconsideration*, "[t]he partners in a limited partnership, through contractual arrangements, largely have the power themselves to determine the rights of the limited partners." Therefore, the insulation criteria adopted by the Commission serve to identify those situations within which it is safe to assume that a limited partner cannot be "materially involved" in the media management and operations of the partnership. As we also stated therein, the powers of a limited liability holder to exert influence or control are not proportional to their equity investment in the limited partnership, since the extent of these powers can be modified by the contractual arrangements of the limited partnership. In the *Attribution Notice*, we stated our disinclination to change our approach of applying insulation criteria in favor of an equity benchmark, and we have not been provided sufficient evidence to revise that view and to indicate that these original reasons for declining to adopt an equity benchmark for limited partnerships are no longer valid.

We also see no need at this time to add to, relax, or otherwise revise our limited partnership insulation criteria. Some commenters suggested that the insulation criteria should be modified to eliminate conflicts with state law, or that RULPA or other relevant standards should be used in their place. However, in our *Attribution Reconsideration*, the Commission decided for several reasons to abandon the use of RULPA, combined with a no material involvement standard, as a standard for judging whether limited partners were exempt from attribution.[384] First, we judged the joint use of these two disparate standards for determining limited partner exemptions from attribution to be unnecessarily complicated. Second, we noted that there was a lack of uniform interpretation of the RULPA provisions, and that the scope of permissible limited partner activities was not statutorily set by RULPA, but rather was determined by the limited partnership agreement itself. Third, we determined that reliance on the RULPA provisions did not provide sufficient assurance that limited partners would not significantly influence or control partnership affairs. We are convinced that these conclusions remain valid today, and therefore we see no reason to revise our insulation criterion in the direction of a RULPA standard. We also feel that similar considerations apply to state laws that regulate limited partnership activities, since these statutes may vary significantly from state to state, and may fail to provide sufficient assurance that the limited partner will

[384] *Attribution Reconsideration*, 58 RR 2d at 616-18.

lack the ability to significantly influence or control the partnership's media activities.

We will not create exceptions for widely-held limited partnerships, such as Business Development Companies, from the current insulation criteria applicable to limited partnerships or otherwise revise those insulation criteria. The essential character of these new business forms for determining attributable interests is the contractual flexibility they allow in setting up and managing the association. Therefore, we believe that the insulation criteria are needed for these business forms to insure the "lack of material involvement" on the part of investors. This would imply that in some limited number of cases, interests may not be insulated because of state laws that require investor rights that conflict with the insulation criterion. However, commenters have not provided sufficient evidence concerning the number or importance of such instances that would compel the Commission to create specialized exemptions for these specialized business forms. Since these entities are allowed greater contractual flexibility under state law than are limited partnerships, we believe that greater caution is warranted in dealing with these novel forms. Further, we have not been presented with evidence to demonstrate that the current insulation criteria are no longer valid or effective in achieving their goals.

We adopt our tentative conclusion in the *Attribution Notice* to treat LLCs and other new business forms including RLLPs under the same attribution rules that currently apply to limited partnerships. The insulation criteria that currently apply to limited partnerships would apply without modification to these new business forms. Therefore, LLC or RLLP owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations of the media-related activities of the LLC or RLLP. We will not distinguish among LLCs based on whether they adopt a more centralized or decentralized form.

We believe that this decision is justified for the reasons discussed in the *Attribution Notice*, which were also supported in the record and fully discussed in the *Report and Order*. In addition, we have been applying the interim processing policy, and it has worked well and effectively, and we see no reason to change it.

We will not routinely require the filing of organizational documents for LLCs. However, to remain consistent with our treatment of limited partnerships and insulation criteria, we will require the same "non-involvement" statement for LLC members who are attempting to insulate themselves. We will also require LLC members who submit the foregoing statement to submit a statement that the relevant state enabling statute authorizing LLCs permits an LLC member to insulate itself/himself in the manner required by our criteria, since our experience shows that state laws vary considerably with respect to the obligations and responsibilities of LLC members. This policy will help us to avoid any potential confidentiality concerns, referred to in the *Attribution Notice*, that may arise if we require filing of organizational documents.

After reviewing all of the comments submitted on our proposals to relax the cable/MDS attribution rules, we are persuaded that the broadcast attribution criteria, as modified by this proceeding, should be applied in determining cognizable interests in MDS licensees and cable systems. We continue to see no reason, and none has been suggested by any of the commenters, to warrant different attribution criteria for broadcasting and MDS. As we have discussed here and in the *Attribution Further Notice*, investment opportunities critical to the development of MDS as a competitive service to cable have been severely limited by the current attribution standard. Therefore, continued application of the current cable/MDS attribution standard would frustrate our goals of strengthening wireless cable, providing meaningful competition to cable operators and benefitting the public interest by offering consumers more choice in their selection of video programming providers. In view of these considerations and the record before us, we conclude that the public interest would be better served if the modified broadcast attribution criteria were employed for the purpose of determining attribution in the context of cable/MDS cross-ownership. Such modification of our existing attribution standard will increase investment possibilities and further diversity, while preventing cable from warehousing its potential competition. We are persuaded, moreover, that relaxation of our current attribution standard will have genuine meaning for institutional investors who, though not involved in the day-to-day activities of either cable or MDS companies, have been precluded from making investments in MDS due to pre-existing or desired investments in cable.

We are not persuaded, however, by GTE's arguments that the proposed modifications to our attribution rule will give dominant wireline carriers an unfair competitive advantage. As we have already determined, the modified, less restrictive broadcast attribution criteria, coupled with the adoption of our proposed 33 percent "equity or debt plus" provision, will enable the MDS industry to avail itself of increased investment opportunities. This will help, rather than hinder, wireless cable's efforts to become a stronger, more viable competitor to cable, while safeguarding against the anticompetitive and warehousing concerns which the cable/MDS cross-interest rules were designed to prevent. For these same reasons, we reject Boston Ventures' proposal that we adopt even less restrictive attribution rules that track those used for CMRS spectrum aggregation limits.

The *Report and Order* also adopts a 33 percent equity or debt provision as an appropriate addition to the modified cable/MDS attribution standard. Furthermore, by adopting the 33 percent "equity or debt plus" provision for cable/MDS attribution, we believe that we are acting in a manner consistent with the statutory directive, as well as furthering congressional intent to promote competition and prevent warehousing by cable operators. Accordingly, we will adopt the broadcast attribution criteria, as modified in this proceeding, for determining cognizable interests in MDS licensees and cable systems. The modified attribution criteria will also apply to the cable/MDS and cable/ITFS cross-leasing rules.

The *Report and Order* adopts grandfathering and transition measures for interests that become newly attributable pursuant to the new rules adopted. Grandfathering and transition measures for TV LMAs are discussed in the *TV Local Ownership Order*.

We intend to modify the Ownership Report form, Form 323, to reflect the addition of the EDP rule, as well as the other attribution changes adopted in this Report and Order.

VI. Report to Congress

The Commission shall send a copy of the Report and Order in MM Docket Nos. 94-150, 92-51, and 87-154, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission shall send a copy of the Report and Order in MM Docket Nos. 94-150, 92-51, and 87-154, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Report and Order in MM Docket Nos. 94-150, 92-51, and 87-154 and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

Appendix C

Comments

ABC, Inc.
AK Media Group, Inc.
Bahakel Communications
Bet Holdings, Inc.
Blackstone Group L.P.
Boston Ventures Management, Inc.
Canwest Global Communications Corporation
CBS, Inc.
Centennial Communications, Inc.
Diversified Communications
Fox Broadcasting Company
Glencairn, Ltd. and WPPT, Inc.
Glenwood Communications Corporation
HSN, Inc.
Jet Broadcasting Company, Inc.
King World Productions, Inc.
Knight-Ridder, Inc.
Local Station Ownership Coalition
McGillen, Cynthia L. and James P.
Media Access Project
Miller Broadcasting, Inc.
Montclair Communications, Inc.
National Association of Broadcasters
Network Affiliated Stations Alliance
Pappas Stations Partnership
Paxon Communications Corporation
Post-Newsweek Stations, Inc.
Press Broadcasting, Inc.
Saga Communications, Inc.
Sinclair Broadcast Group, Inc.
SJL Communications, Inc.
Tele-Communications, Inc.
The Project on Media Ownership
Viacom, Inc.
Waterman Broadcasting Corporation
Wireless Cable Association International, Inc.

Reply Comments

ABC, Inc.
AK Media Group, Inc.
Bahakel Communications, Ltd.
Bet Holdings, Inc.
Blackstone Group, L.P.
Clear Channel Communications, Inc.
Fox Broadcasting Company
GTE Service Corporation
HSN, Inc.
Lockwood Broadcasting, Inc.
Media Access Project
Mt. Mansfield Television, Inc.
National Cable Television Association, Inc.
Pappas Stations Partnership
Qwest Broadcasting L.L.C.
Retlaw Enterprises, Inc.
SJL Communications, Inc.
Tele-communications, Inc.
Tribune Broadcasting Company
Viacom, Inc.
Westwind Communications, L.L.C.
Wireless Cable Association International, Inc.

SEPARATE STATEMENT OF
CHAIRMAN WILLIAM E. KENNARD
AUGUST 5, 1999 MEETING

Today, we are bringing to a close proceedings that have been pending since 1991. These rule changes are long overdue. For far too long it's been a case of administration by waiver, not by rule. Parties have presented us with a variety of business arrangements and combinations, and we have not been able to set a bright line test as to what's permitted and what's not, and so the problem just keeps getting worse.

Today we are cleaning up our rules and providing the certainty that the market needs.

But more than that, we are adopting commonsense rules that recognize the dramatic changes that the media marketplace has undergone since our broadcast ownership rules were adopted 30 years ago. Back then, there were three broadcast networks; cable was still a novelty; and interactive TV meant yelling at your kids to turn it down. Now, cable systems serve almost 65 million TV households; other multi-channel video programmers -- such as Direct Broadcast Satellite -- offer hundreds of channels to viewers; since 1970, the number of radio and television stations has increased by more than 85 percent; and people are watching everything from hip-replacement surgery to the local weather on their PC's linked to the Internet. As we cross over into the next millennium, we are clearly entering a new media age.

In such an age, we need to provide broadcasters with flexibility to seize opportunities and compete in this increasingly dynamic media marketplace. These items will not only help them compete with the growing number of alternative media. They will also help preserve free local broadcast service. It is this localism that makes broadcasters so special. That is why we are taking steps, for example, to allow a television licensee to buy another station in the same market, as long as the market will continue to be served by at least eight independently-owned television stations and at least one of the merging stations is not one of the top four stations in the market. It is also why we will waive the rule in situations involving financially-troubled and unbuilt stations. In these cases, allowing a small station to combine with another station in the market -- and take advantage of shared costs and operating efficiencies -- will increase competition and outlet diversity in the local market and at times keep a station on the air that otherwise would go dark. For these same reasons, we are also relaxing our radio-television cross-ownership rule.

This is not, however, the time to completely deregulate broadcast ownership.

Our ownership rules have always reflected core values of competition, diversity, and localism. The changes we are making today are tailored to grant broadcasters more flexibility while at the same time ensuring that consolidation will only occur in markets where these core values will not be undermined. Our action today thus strikes an appropriate balance, by relaxing the rules but maintaining a diversity floor.

We are also taking steps to better identify broadcasters' real ownership interests in media properties, which will make our ownership rules more meaningful and easier to apply. Our new "equity/debt plus" attribution rule, for example, will ensure that our rules take account of the ways that debt instruments can be a source of influence over a licensee. And by making LMA's attributable, our rules will prevent the use of time brokerage agreements to circumvent our ownership limits.

Many existing LMA's will meet our new television duopoly rules. But as to the others, we do not wish to upset established business relationships entered into before we made clear our proposal to attribute LMA's. We are, therefore, providing significant grandfathering relief for those LMA's entered into before November 1996, and we are allowing those entered into after that date two years to comply with our new rules. We are also providing significant grandfathering relief to parties holding conditional waivers of our radio-television cross ownership rule or with a pending application for such a waiver. These steps reflect our concern that parties' established business interests not be unduly upset, and a balance between the need to maintain a diversity floor in local markets and the recognition that in some cases LMA's have enhanced competition and outlet diversity in local markets.

That being said, I think we need to consider more broadly the role of LMAs in broadcasting. While they have no doubt produced some benefit, they represent a kind of artifice. I believe we need to consider whether the benefits of LMAs could be attained through other arrangements, such as actual joint ownership, that do not raise questions concerning the responsibility and accountability of the actual licensee of a station.

It may well be that as a result of our action today, most of these problems will fade away because LMAs will be converted into duopolies. But I will be watching what happens in this regard, because I'm concerned about the degree of control that is conferred by an LMA.

In sum, our actions today will provide broadcasters with the certainty they need to make rational business judgments in the marketplace. These items recognize the competitive realities of the new media age while honoring our nation's oldest values. For these reasons, I am pleased to bring these long-pending proceedings to a conclusion.

Separate Statement
of
Commissioner Susan Ness

Re: *Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154; Broadcast Television National Ownership Rules, MM Docket No. 96-222.*

I welcome today's long-overdue revision and clarification of the Commission's broadcast ownership and attribution rules. The decision today takes its direction largely from the Telecommunications Act of 1996, in which Congress decided to allow significantly increased concentration of ownership in the broadcast marketplace. It also takes into account recent, dramatic changes in the communications marketplace, as well as insights gained from experience with our previous rules. The result is a forward-looking regime that provides increased flexibility and clarity, while still avoiding the dangers of undue concentration of ownership of vital sources of news and information.

The media landscape has changed enormously since I joined the Commission in 1994. There was the Telecommunications Act of 1996 -- which set the stage for significant consolidation of ownership, especially in radio. There is the now-significant presence of DBS, which was just being launched a few years ago but now has over 10 million subscribers. There is the continued growth of cable, with system "clustering" rapidly replacing the crazy quilt ownership patterns of the last twenty years in major metropolitan areas. The financial interest and syndication and prime time access rules are gone. TV broadcasters are beginning their conversion to digital broadcasting. The Internet is experiencing explosive growth.

These and other changes make it timely (at best!) for us to conclude our long-pending ownership and attribution proceedings.

I believe our rules and policies must be based on the present and future characteristics of broadcasting, not our perceptions of the medium as it existed 50 or even five years ago. At the same time, broadcasting remains a distinctly special service -- with unique privileges and unique responsibilities.

Broadcasting continues to be the primary source of news and information for the American public. It is free and ubiquitous. No preexisting hookup or bottleneck provider stands between speaker and listener. Diversity of media ownership is fundamental to the preservation of our democratic values.[1] The public benefits greatly from "diverse and antagonistic" voices in the broadcast marketplace. The special characteristics of broadcasting have been recognized by Congress, the courts, and this Commission.

It wasn't so long ago that broadcasters were limited to owning no more than 12 AM, 12 FM, and 12 TV stations, nationwide, with no more than two AM, two FM, and one TV station in any market. Yet today, some radio groups encompass several hundred stations, with as many as eight in a single market, and perhaps a TV station and an LMA as well.

I have long felt that our rules were susceptible to "gaming." We have been too willing to permit through the back door what we would not countenance through the front. We have been too willing to grant conditional waivers while we dithered about what the rules should be. As a consequence, we have penalized those who most diligently followed the letter and spirit of our rules, and rewarded those who "pushed the envelope" most aggressively.

Today's decision should put us on a more defensible and sustainable course. Greater clarity in the rules -- and less subjectivity -- will promote fairness among market participants. It will also provide greater certainty to investors. And it should lead to more expeditious decisions by the Commission.

I am pleased that we are eliminating the worst anomalies of the old regime. Who can explain why LMAs are considered attributable interests when they involve radio stations, but not when they involve TV? Many LMAs have produced demonstrable programming and other public interest benefits for their communities. Others have not. I welcome our decision to attribute LMAs, as well as our decision to grandfather those that were entered into before November 5, 1996 - the date when all

[1] This is widely recognized. As Peter Jennings has observed, "The fewer large organizations there are owning more media – in very general terms – the potential for that being worse for the media and not better is just obvious. Because when you have a lot of media owned by a lot of people, there is an obvious opportunity for much more free expression." John Malone put it this way, "I think that what protects our free society is the fact that no one power broker can control enough of the media in any market, let alone the national market, to basically get away with compressing or slanting or distorting the news."

parties were clearly on notice of our intention to move in this direction. Those that meet our going-forward rules may continue, and we are giving those that are grandfathered generous relief.

I have previously raised concerns about the potential for an investor with a 49 percent ownership interest to exert "influence" over the affairs of a broadcast licensee, even in a corporation with a single majority shareholder. I support the compromise we have reached to adopt an "equity/debt plus" concept of attribution that limits the single majority shareholder exemption in situations involving a major program supplier or same-market media entity. These are the entities whose incentive to influence a broadcaster weighs most heavily in favor of attribution. Our targeted approach embodied in the "equity/debt plus" concept balances our competing concerns of maximizing the precision of our attribution rules, avoiding undue disruption of the flow of capital, and establishing a bright-line test that affords certainty to those planning transactions.

There are a few narrow areas where I would have preferred to go a different way from the majority, for reasons that have less to do with ownership concentration than with concerns about fundamental fairness. I believe that we have been too lenient in grandfathering situations that were previously allowed under conditional waivers -- waivers that were supposed to expire at the outcome of these proceedings. We started down the conditional waiver path because of a desire temporarily to accommodate major acquisitions, permitting them to close without awaiting a resolution of our broadcast ownership dockets. Everyone recognized when the conditional waivers were granted that the licensee would have to conform to the new rules, with six months to divest any nonconforming properties.

This accommodation became an albatross around our necks. And now we are perpetuating the waivers, creating a special class of broadcasters who, for as long as they own the stations, can own more properties in a market than their competitors. This isn't fair. It isn't good precedent. And it undermines our credibility in considering future conditional waiver requests in other contexts.

I also would have preferred a somewhat different result with respect to our revised one-to-a-market rule. In determining compliance with the voice test, I would count only independent radio and TV voices in the market. These are the media encompassed by this cross-service rule, and I believe it makes most sense to compare the number of radio and TV voices held jointly in a market only to the number of independent radio and TV voices remaining in that market. Today's item goes further, however, and also considers as voices daily newspapers and cable TV. I disagree with the inclusion of these media in the voice count.

Once we include newspapers and cable, it becomes difficult if not impossible to validly distinguish them from other media that arguably serve as a source of competition and diversity in the market, such as MDS, the Internet, cable overbuilds, and OVS systems. Rather than make arbitrary decisions on whether to include these media as "voices," it would be far simpler and administratively easier to count only radio and TV and, if necessary, to adjust the voice count accordingly. However, as the decision was made to include newspapers and cable, I do agree with the decision to limit those newspapers counted to those published and widely circulated in the market. I also agree that, if we must count cable, it should count as only one voice.

But, despite these misgivings -- as well as a more generalized concern that we have not adequately analyzed the cumulative effect of all the changes that have occurred as a result of the 1996 Act -- I support these orders as a compromise that I believe will provide a much stronger foundation for the future. As Senators Hollings and Dorgan observed in a letter to Chairman Kennard, "It is imperative . . . that the Commission remain mindful of the careful balancing struck in [the Telecommunications Act] between updating the rules to reflect changes in the marketplace and maintaining the robust diversity of voices, localism, and competition in the broadcast industry that was evident at the time of enactment." I believe that we have done so.

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH
DISSENTING IN PART AND CONCURRING IN PART

In the Matter of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154.

I support the Commission's decision in the matter of Reexamination of the Commission's Cross-Interest Policy to repeal the cross-interest rules. I thus join in Part III.D of this Report & Order. I disagree, however, with the decisions reached in the matter of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests and in the Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry. I thus dissent from the rest of the item. I do so for the reasons expressed below.

The biggest problem with our attribution rules -- these new ones included -- is that it is next to impossible to say what sorts of counting rules one should fashion for broadcast interests if one is unable coherently to articulate the need for counting interests. In other words, the purpose of the broadcast ownership rules must be clearly identified before one can know how to craft implementing regulations, such as attribution standards. For instance, if one were concerned with antitrust matters (assuming authority to do so), notions of "control" might be tied to market power and the ability to discipline markets. If, on the other hand, one were concerned with programming content (assuming this were constitutional, which it is presumptively not), notions of "control" would go to the ability to buy or sell programming to stations. This is not to say that we should not aim to harmonize our various attribution rules to the greatest extent possible, but that without a clear sense of *why* to count, it is hard to know *how* to count.

As I argue in the broadcast ownership rulemaking, the Commission has not answered this threshold question -- the purpose of the ownership rules -- with the rigor and clarity necessary to the task. *See* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; and in the Matter of Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8.* Not only is the legitimacy of the broadcast ownership rules themselves thus diminished, but corollary rules such as the attribution rules suffer from the same frailty. I, of course, would not have structural ownership regulation, and thus do not see the need for attribution rules. But if there are going to be structural rules, their purpose should be clearly defined so that meaningful attribution rules can be crafted.

I also disagree with the very premise of the *Attribution Further Notice* issued in this proceeding: namely, that the relaxation of ownership limits in the Telecommunications Act of 1996 required reexamination of broadcast attribution standards. *See* 11 FCC Rcd 19895 (1996). Nothing in the text of the statutory mandates revising ownership limits suggests that the changes should have any impact whatsoever upon the attribution rules. Presumably Congress was aware of the existing attribution regulations when it passed the ownership changes and knew that the new limits would work in conjunction with those regulations. This is not to say that the Commission cannot change the attribution rules if necessary , it can, but that the deregulation of ownership has no necessary connection to changing the attribution standards -- unless, of course, one is looking for ways to counter, limit, or mitigate the effects of Congress' decision to deregulate ownership.

Although the items disclaims any intent to tighten the attribution rules in the wake of the 1996 Act, *see supra* at para. 35, these rules are not simply more precise than the old ones. They work to capture more interests than the old rules, thus making more properties attributable for ownership purposes. If it were precision that the Commission sought to achieve, we would just have simplified the structure of the existing rules. But, unfortunately, we did not do so. Instead, this Commission has once again tightened underlying or related rules in order to avoid as much deregulation as Congress intended.

In this regard, the Commission is much like Penelope in Homer's *Odyssey*. Waiting for Odysseus to return from war, but pressed by the chiefs of her land to marry again, she invents stratagems to put them off. She says she cannot remarry until she finishes needlepointing a pall for the hero Laertes. All day long, she works on her web, but at night she unpicks each and every stitch by torchlight. Looking outwardly somewhat deregulatory in the broadcast local ownership proceeding, the Commission undoes here much of the relief it provided there.

On the merits of the attribution decision, I do not think that we should extend attribution rules into the area of pure debt instruments, as does this Report & Order. I would not count debt for attribution purposes. When one ventures into the area of pure debt, one encounters an administrative hornets' nest. Almost all companies have some debt and, given the variety of instruments and agreements, this debt fluctuates in terms of value and sometimes, if transferrable, even in terms of possession. As a *practical* matter, debt is a concept that is nigh impossible to measure with reliable precision, even if there is support for the *theory* in academic literature. For these reasons, I disagree with the decision to extend attribution rules into the area of pure debt.

I also believe that the EDP test itself is misguided. Instead of clarifying or perhaps even simplifying current broadcast attribution standards, this Report & Order heaps yet another regulatory board on top of the existing gangplank of attribution rules. Now, in addition to wading through existing attribution rules, regulatees and their lawyers must *also* apply the EDP test to determine whether the interests that they have just ascertained are not attributable under the old rules are nonetheless attributable under the EDP rule. Yet, in order to know whether the EDP rule even applies, the entity, if a potential "major program supplier," must assess the percentage of program supplied to a particular station at some particular point in time. Like debt, this is in all likelihood an ever-changing number, difficult to pin down and costly to ascertain. And if a potential "same market media entity," the company must ask whether any other of its interests are attributable such that it might be a "media entity," bringing it full circle to the original attribution rules; the daisy chain effect of these regulations regarding attribution is, apparently, limitless. Then, after figuring out whether one falls under the subject headers of the EDP rule, major program supplier and same market media entity, one must then apply the operative sections of the rule, no mean task.

Finally, absent a drastic simplification of existing attribution rules, I would have retained the single majority shareholder attribution exemption in full. The certainty this rule gives against the backdrop of the existing rules affords at least some relief and clarity to certain entities, in terms of understanding and assessing the attributable nature of their interests, and should be preserved.

* * *

Stepping back to survey the newly-designed landscape of attribution rules, I am reminded of Justice Frankfurter's description of a gerry-mandered voting district as "an uncouth twenty-eight-sided figure." *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960). These attribution rules are as many, if not more-sided. I regret that, instead of taking this opportunity to simplify the attribution rules, the Commission has only further complicated them by extending the existing rules to encompass pure debt interests; by adoption of the EDP test; and by limitation of the single majority shareholder exemption.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: *Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221); and Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8)*

Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150); Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; (MM Docket No. 92-51); and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

Today I vote in favor of these orders revising the Commission's rules governing local broadcast ownership. I write separately to give greater context to my vote.

I believe that the actions we take today are both constitutional and consistent with the explicit intent of Congress to promote diversity and competition in the media marketplace. Section 257(b) of the 1996 Act explicitly instructs the Commission to "promote the policies and purposes of this Act favoring diversity of media voices." 47 U.S.C. Section 257(b). Thus, as we review our ownership rules, it is clearly the intent of Congress that we consider the implications of our rules on diversity.

I agree that diversity is very hard to define, and is at some level a visceral concept. Accordingly, we should be cautious in over-invoking it as a justification for imposing or intruding on constitutionally protected activities. Yet, not all worthy policy goals, not all important government interests, and indeed, not all compelling government interests, can be quantified or measured with precision. I do not believe the Constitution boxes out all subjective judgment in government actions. Yes, diversity is hard to define, but not more so than obscenity, privacy, or interstate commerce, areas in which the law allows government activity. What is important, is that such rules be balanced and well-reasoned. Moreover, where rules involve some degree of subjective balancing, they should be reviewed frequently to ensure they remain on keel, given changing conditions in the market. This is what I feel the Commission has failed to do over the years. But the Commission takes an important step forward today, and it should continue to review these rules at periodic intervals, as Congress instructed. 47 U.S.C. Section 202(h).

In all of the discussion about diversity and localism, I believe we lose sight of something that is unique about broadcasting, something that I believe is a substantial public benefit and something that is not so easily entangled in the web of concern about content infringement. It is the fact that broadcasting is free.

There are substantial public benefits that flow from the free broadcasting business model. It provides access by all of our citizens to news, entertainment, and information, regardless of their socio-economic class. It provides valuable information to citizens in natural disasters who cannot access their phones or cable systems because of downed lines or loss of power. It lets people in a mobile society stay connected to the outside world, as well as individuals in remote areas.

But, this free business model is quite unique and, thus, some special consideration of the challenges to it is warranted. For example, as a medium it competes against other media that have access to subscription revenue in addition to advertising dollars. Broadcasters cannot as easily repackage programming or recoup costs of purchasing high quality programming. And they have significantly less distribution capacity than most of their competitors. Therefore, it is important to ensure our rules do not unduly constrain broadcast business competitiveness and viability.

Additionally, the public value of having a diverse free medium also warrants some government attention to undue concentration. If a single media group were to monopolize a market, advertising rates would likely increase as would the desire for advertisers to place advertisements with the concentrated media group. Because advertising dollars are not infinite, it would mean other stations would suffer the effects of less advertising revenue, which is the lifeblood of a station's viability. Should such a station be crippled or fail, the public would have lost a source of programming. This could happen irrespective of how highly the public might value the station, since they cannot express their preference by paying higher rates to sustain the station. For this reason, we are justified in giving some consideration to the structure of the market for free broadcasting.

Finally, I would be remiss if I did not briefly express a few of my concerns. In the items adopted today the Commission does not grandfather LMAs that were entered into after November 1996, the date of the Further Notice of Proposed Rulemaking in these proceedings. I would have preferred to grandfather LMAs entered into after November 1996. The Commission's delay in bringing these proceedings to a close since 1996 has forced broadcasters to make business decisions regarding LMAs for over three years without knowing what the rules would be. As a result, I believe the equities lie in favor of grandfathering these arrangements.

I also would have preferred to count additional media in the voice counts. For example, where cable is subject to effective competition as a result of a cable overbuild, I would argue that there are two voices for cable in that market. I would not have required *involuntary* bankruptcy to access the failed station waiver. I do not believe that there is any real threat of a broadcaster's entering into bankruptcy voluntarily to gain the benefits of this waiver provision.

Rules, however, are by their very nature both under- and over-inclusive. The rules we adopt today are not all right, and not all wrong. But they reflect what good public policy often must be, a balanced compromise of conflicting values and judgments. And I believe that with the Orders adopted today, the Commission takes an extremely important step toward aligning our rules with the current realities of the electronic media market programming market.

STATEMENT OF COMMISSIONER GLORIA TRISTANI ON BROADCAST OWNERSHIP

In the Matters of: Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221), Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Broadcast Television National Ownership Rules (MM Docket No. 96-222), Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (MM Docket No. 94-150), Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry (MM Docket No. 92-51), and Reexamination of the Commission's Cross-Interest Policy (MM Docket No. 87-154).

I had two goals for these proceedings: (1) to eliminate the fictions and subterfuges that have plagued our broadcast ownership rules; and (2) to strike the appropriate balance between the potential public interest benefits and the potential harms of increased consolidation. For the most part, as discussed below, I believe we have hit the mark.

Eliminating Fictions

One of the disturbing characteristics of our broadcast ownership rules was the gap between the rules as they were written and the rules as they were enforced. For instance, duopolies were strictly prohibited under the rules, but station owners were able to use the LMA artifice to control the programming decisions of a second station in the market without that station being attributable. Similarly, our one-to-a-market rule was effectively eviscerated by a Commission waiver process that became, in practice, a rubber stamp.

Today's decisions largely put an end to these and other fictions. LMAs are now attributable. The one-to-a-market waiver process will be tightened. Debt is now recognized as a factor that can bestow influence. Eliminating these fictions often has meant relaxing the underlying substantive rule involved. But I would much rather relax the underlying rule to reflect reality than to keep a rule on the books that is meaningless. Today's decisions should not only promote respect for the Commission's rules and processes, but should also help level the playing field between Washington insiders and those outside the beltway who still believe that our rules mean what they say.

As for LMAs in particular, although the subterfuge is over and they are now attributable, this Order does not outlaw them. Nevertheless, I hope and expect that there will be few, if any, new LMAs, since their regulatory *raison d'etre* has been eliminated and the duopoly rule has been relaxed. I do not believe it is appropriate for control of a station's programming to be divorced from control of a station's license. The licensee is the one responsible for programming its station to serve the local community; that responsibility should not be delegated to a third party. The sharp drop in new radio LMAs after the Commission found them attributable gives me every reason to expect that television LMAs will suffer the same fate. If this proves incorrect, I would revisit the LMA issue.

One rule change that is expessly intended to bring our rules in line with reality is the narrowing of the duopoly rule to permit common ownership of television stations in different DMAs, regardless of contour overlap. According to the Order, DMAs "are a better measure of actual television viewing patterns" than a signal contour test, "and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products." I could not agree more. Indeed, I have made this very point on several occasions in the context of our local radio ownership rules, which still rely exclusively on signal contours to define the relevant "market." I look forward to changing our radio ownership rules to reflect reality as we have done for our television rules.

Unfortunately, there is one fiction that the Commission chose to retain: the single majority shareholder rule. Under this rule, as long as a single shareholder owns more than 50% of a licensee's voting stock, no other interests are attributable. That means, for example, that someone could own 49.9% of the voting stock, own the studio and transmission facilities, and provide all of the station's debt, and still be deemed unable to exert significant influence over that station's decision-making. I realize that the scope of the single majority shareholder rule has been narrowed somewhat by the adoption of the equity/debt plus rule, but the EDP rule only applies to programming suppliers and same-market media entities. The attribution rules, however, should identify *any* relationship that permits an entity to exert significant influence over another. If, for policy reasons, we wish to permit certain entities to obtain ownership interests notwithstanding their ability to influence the licensee, we should do so directly and not through the fiction of claiming that such influence does not exist. I therefore dissent from that part of the Attribution Report and Order.

Finding the Public Interest

This has been a difficult decision to reach. Making decisions about diversity is never easy. In the end, I did not agree to relax our broadcast ownership rules because I believe we have "enough" diversity or because the growth in new media outlets means that diversity is no longer a concern, but because I believe that the diversity benefits of the relaxed ownership rules we adopt today outweigh the potential harms. Let me explain this apparent paradox.

For those of us who care about diversity, the easy answer would have been to insist on a maximum number of independent owners -- the Commission's traditional proxy for maximizing the number of different "voices" in a community. And generally, I still believe that this proxy is a good one. Those television licensees who can stand alone and provide a real local voice should be required to do so. As the Order notes, it is at the local level that our diversity concerns are most acute. But I became convinced through the course of this proceeding that separate ownership -- at least in the full-power television context -- does not necessarily translate into a meaningful local "voice." That is, if a licensee's low market share does not give it the resources to originate any local programming, such as news or public affairs, the community may have an additional owner but no meaningful additional voice.

In those cases in which a licensee is unlikely to contribute to local diversity, I believe the public interest may be better served by permitting that station to combine with a stronger station in the market. With the efficiencies of consolidation, for instance, the weaker station may be able to change from running only infomercials and reruns, or simply passing through a satellite-delivered signal, to a station that is able to provide local news. Or maybe the stronger station will use the weaker station as some broadcast networks use their cable channels -- as a forum for more in-depth news pieces or to stay with breaking stories rather than returning to the network feed. Either way, it is not clear to me that the public is better off with a separate owner with no local content than with a duopoly that permits one owner to provide more and better local content.

But make no mistake: this is not an exact science. We could have drawn the line in a different place, and there may be situations in which a viable local voice is removed from the marketplace under the new rules. Overall, however, I believe that we have struck the appropriate balance and that the new rules will do more good than ill for meaningful local diversity and for serving the public interest.